IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.420 OF 2005

Ajit Thakkar .. Appellant

vs.

Bhaggal Kharbhan Kunbi .. Respondent.

Mr. N.V.Walavalkar with Rajan Kakkara for the Appellant.

Mr.M.r.Yadav for the Respondent.

CORAM : A.S.OKA, J.

DATED : 2nd May, 2005.

P.C. :

1. Heard the Advocates appearing for the parties.

2. The Appellant is the Original Defendant. The Respondent is the Original Plaintiff. The Respondent had taken out the notice of motion for temporary injunction. Admittedly, reply was filed by the Appellant to the said Notice of Motion. The said Notice of Motion was kept for hearing on 21.6.2004. It is the case of the Appellant that the Advocate appointed by the Appellant was attending to a matter in this Court and therefore he was not present. The learned trial Judge proceeded with the

hearing of the Notice of Motion in absence of the Appellant's Advocate and the Notice of Motion was made absolute. Within one month from the date of the order, the Appellant had taken out the present Notice of Motion for setting aside the order passed on the Notice of Motion taken out by the Respondent and for restoration of the Notice of Motion. By the impugned order, the subsequent Notice of Motion taken out by the Appellant has been dismissed by holding that the earlier Notice of Motion has been decided on merits. It is not in dispute that in the present Notice of Motion taken out by the Appellant, there was an ad-interim relief granted by virtue of which order passed in Notice of Motion No.2454 of 2003 taken out by the Respondent was stayed.

3. Shri Walavalkar, appearing for the Appellant submitted that when the Notice of Motion taken out by the Respondent was admittedly heard in absence of the Advocate for the Appellant, the learned Judge ought to have allowed Notice of Motion and ought to have fixed the original Notice of Motion for hearing. He submitted that construction of building has been completed.

4. The learned Advocate for the Respondent

submitted that the Appellant has not done his duty by paying the requisite amount to the Respondent. He submitted that the Judge while deciding the Notice of Motion for injunction has considered the reply and other documents filed by the Appellant. He, therefore, submitted that no interference is called for.

5. I have considered the rival submissions. It is not in dispute that on 21.6.2004 when Notice of Motion 2454 of 2003 was heard, the Advocate for the Appellant was absent. In absence of the Advocate for Appellant, the learned trial Judge disposed of the Notice of Motion. The present Notice of Motion was taken out by the Appellant is for setting aside the order dated 21st June, 2004. In affidavit in support filed by the Appellant it was pointed out that the learned Advocate appointed by the Appellant was in this Court when the Notice of Motion was taken up for hearing. In my view, when the Notice of Motion was taken out by the Respondents was heard in absence of the advocate of the Appellant, the learned trial Judge ought to have given opportunity to the Appellant of being heard in the earlier Notice of Motion. This was not the case where the Appellant was negligent. The Appellant had

appointed an advocate and had filed affidavit in reply to the Notice of Motion. Only because his Advocate was absent, the Appellant cannot be made to suffer. The learned trial Judge ought to have adopted a liberal approach in the matter. The prejudice which may be caused to the Respondent could have been compensated by ordering payment of costs.

6. In my view the Appeal must succeed. It is true that by restoration of earlier Notice of Motion filed by the Respondent prejudice will be caused to the Respondent. The Respondent deserves to be compensated by ordering payment of costs. The amount of costs is quantified at Rs.7500/-.

7. Accordingly, I pass the following order:

a) Impugned Judgment and Order dated 11.3.2005 is quashed and set aside and the Notice of Motion No,.2838 of 2004 is made absolute in terms of prayer clause (a) subject to the condition that the Appellant will pay the costs of Rs.7500/- (Rupees Seven Thousand Five Hundred Only) to the Respondent within a period of four weeks

from today.

b) If the amount of costs is paid within a period of four weeks, parties will appear before the learned trial Judge on 13.6.2005. The learned trial Judge will take up the Notice of Motion No.2454 of 2003 for hearing and will decide the same as expeditiously as possible.

c) All contentions of the parties in the aforesaid Notice of Motion are expressly kept open.

d) Appeal is partly allowed in above terms with no orders as to cost.

. Parties and the concerned court to act on the authenticated copy of this order.

(A.S.Oka, J.)